

IN THE SUPREME COURT OF OHIO

ROLAND NICKLESON, Pro Se
-Appellant-

On Appeal from the
Wood County Court of
Appeal Sixth Appellate
District

-vs-

Court of Appeals
Case No. WD-11-039
GEN- 2011-1780

STATE OF OHIO
-Appellee-

MERIT BRIEF OF APPELLANT ROLAND NICKLESON

Roland Nickleson, Pro Se #516813
-Appellant-

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-Appellee-

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TABLE OF CONTENTS

<u>Table of Authorities</u> -----	Page
<u>Statement of Facts</u> -----	P. III
<u>Argument</u> -----	P. I
<u>Proposition of Law No. I:</u> The trial Court refused to issue a final Appealable order when it failed to comply with Crm.R.32(c) by journalizing its findings for the count of robbery in violation of R.C. 2911.02(a)(2) of the indictment-----	P. 1
<u>Proposition of Law No. II:</u> The trial Court abused its discretion and committed plain error when it failed to grant the State's motion to amend count four(4) of the indictment due its duplicitous nature and offending language; which charged multiple offenses in a single count of the indictment-----	P. 2
<u>Proposition of Law No. III:</u> The trial Court abused its discretion and committed plain error when it failed to charge the jury with an instruction which would cure the error that count four's(4) duplicitous language and multiple offenses caused-----	P. 4
<u>Proposition of Law No. IV:</u> The evidence offered at trial was insufficient and against the manifest weight to support a conviction for count's 1,2,3, and count four's(4) robbery in violation R.C. 2911.02(a) (1) with a deadly weapon-----	P. 6
<u>Conclusion:</u> -----	P. 10
<u>Proof of Service:</u> -----	P. 11
<u>Appendix:</u> -----	
Notice of Appeal to the Ohio Supreme Court (October 17, 2011)-----	
Opinion of the Wood County Court of Appeals (August 31, 2011)-----	
Order of Wood County Court of Common Pleas (May 26, 2011)-----	

Constitutional Provisions and Statutes:

Sixth Amendment to the United States-----
Article IV, Section 3(b)(3)-----

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>PAGES:</u>
<u>Downing v. U.S. 493 U.S.1025</u> -----	P. 4
<u>Fenley v. Brown 1998 WL 526516</u> -----	P. 2
<u>Geesman v. St. Rita's Med. Ctr. 917 N.E. 2d 867</u> -----	P. 6
<u>Goldfuss v. Davidson 679 N.E. 2D 1099</u> -----	P. 6
<u>In re Alyssa C. 790 N.E. 2D 803</u> -----	P. 6
<u>In re Etter (1998) 731 N.E. 2D 694</u> -----	P. 5
<u>Jackson v. Virginia (1979) 443 U.S. 307</u> -----	P. 9
<u>Sanderson 996 F.2d 187</u> -----	P. 3
<u>Tibbs v. Florida (1982) 457 U.S. 31</u> -----	P. 6
<u>U.S. v. Dolan 99 F. 2d. 1140</u> -----	P. 3
<u>U.S. v. Duncan 850 F.2d 1140</u> -----	P. 4
<u>U. S. v. Petersen 768 F. 2d 64</u> -----	P. 4
<u>Wheeler v. McKinley Enterprises 973 F. 2d 1158</u> -----	P. 8
<u>State v. Bradley (1984) 42 O. St. 3d 136</u> -----	P. 5
<u>State v. Broom 1998WL204328</u> -----	P. 2
<u>State v. Carter 2010WL5441988</u> -----	P. 6
<u>State v. Colon 2008-Ohio-1624</u> -----	P. 9
<u>State v. Colon 2008-Ohio-3749</u> -----	P. 9
<u>State v. Comen (1990) 50 O. St. 3d. 206</u> -----	P. 6
<u>State v. DeHaas 227 N.E. 2D 212</u> -----	P. 6
<u>State v. Duff 1998WL2043328</u> -----	P. 2
<u>State ex. rel Davis v. Cuyahogo City Court of Common Pleas 2010-Ohio-4728</u> -----	P. 1
<u>State ex rel. Squire Cleveland (1948) 82 N.E.2d 709</u> -----	P. 6
<u>State v. Hobbs 2008WL4193634</u> -----	P. 8
<u>State v. Jenks 574 N.E. 2d. 492</u> -----	P. 6

<u>State v. Johnson 545 N.E. 2d. 636</u> -----	Pg. 4
<u>State v. Martin (1983) 485 N.E. 2d. 717</u> -----	Pg. 6
<u>State v. Pelfrey 860 N.E. 2d. 735</u> -----	Pg. 8
<u>State v. Robinson (1955) 124 N.E. 2d. 148</u> -----	Pg. 6
<u>State v. Wolon (1989) 541 N.E. 2d. 443</u> -----	Pg. 6

Constitutional Provisions and Statutes:

- Crn.R.32(c)and(b)
- R.C. 2911.01(a)(1)
- R.C. 2911.02(a)(1)and(2)
- R.C. 2945.75(a)(2)

Statement of Case and Facts:

This case arises from Appellant's request to be issued a final Appealabe Order and to be resentenced in compliance with Crm.R.32(c). Appellant maintains that the statement of case and facts stated in the 'Memorandum in Support', filed Oct. 17, 2011, remains consistent with the statement of case and facts herein.

PROPOSITION OF LAW NO. I:

The trial Court refused to issue a final Appealabe order when it failed to comply with Crm.R.32(c) by journalizing its findings for the count of robbery in violation of R.C. 2911.02(a) (2) of the indictment

Crm.R.32(c) appeared to be clear in its directive of imposing on every court a mandatory duty to set for the the verdict of its findings as to each and every charge prosecuted against an accused; which is the basis upon which Appellant relied in initiating this action. In the announcement of **State ex. rel Davis v. Cuyahoga City Court of Common Pleas 2010-Ohio-4728** however, it was determined that offenses which did not result in a conviction were excluded from the journalizing requirements set forth by Crm.R.32(c), as they may be resolved in other ways such as dismissals, nolle or not guilty findings. But the **Davis** decision did not include counts of an indictment which were 1) duplicitous-(see indictment), 2) the focus of a 'motion to amend' the indictment filed by the prosecution at trial-(Tr.Tp.Pg.126-128), or 3), the core cause of the jury's confusion and question to the trial Court during deliberations-(see Tr.Tp.Pg.197 Ln.5-9).

It would reason that because neither Crm.R.32(c) nor **Davis** specifically addresses, by inclusion or exclusion, counts of an indictment which ^{ARE} ~~as~~ as complex as found in count four(4) of the instant case, the rule and decision on both pertain to ordinary counts of an indictment which in effect, may be resolved and disposed of in an ordinary fashion and course of law. And because a duplicitous count is not an ordinary count of an indictment, the mandatory duty to set forth the verdict of its findings(with respect to a duplicitous count) is a Crm.R.32(c) requirement which a trial Court should be required to strictly comply with. Therefor, the trial Court's failure to journalize the verdict of its findings as to each and every count of the indictment proves to be crucial where a count of the indictment is duplicitous and failure to journalize the verdict of said duplicitous count raises the risk that defendant's conviction may be based on legally flawed theory.

PROPOSITION OF LAW NO. II: The trial Court abused its discretion and committed plain error when it failed to grant the State's Motion to Amend count (4) of the indictment due to count four's duplicitous nature and offending language; which charged multiple offenses in a single count of the indictment.

If an amendment is merely the correction of matter that does not affect the indictment validity (“surplusage”) it is usually permitted. (see Georgetown Law Journal, Crim. Proc. Project, Pg. 263)

It is within a trial court's discretion to strike superfluous matter. (see Fed. Crim. P. 7(d); Crim. R.7(D); Also State v. Broom, 1990 WL 204328 and State v. Duff 1998 WL 2043328 . The presumption is that the material will be stricken only if it is irrelevant or prejudicial. (see e.g. U.S. v. Mulder 273 Fd. 3D 91, 100) Where a plaintiff fails to make a prima facie showing of support for new matters sought to be pleaded, a trial court does not abuse its discretion to deny a motion to amend the pleadings. Fenley v. Bowman 1998 WL 526516.

Although the issues found in Bowman are not on point with those found in the instant case, Appellant finds relevance where the Bowman court sets forth the standard of making a prima facie showing of support for a motion to amend. In the instant case, count (4) of the indictment in which Appellant received, duplicitously charged both a violation of R.C. 2911.02(a)(1) and (2) of the robbery statute. (see Indictment and Bill of Particulars). The Georgetown Law Journal Crim. Proc. Project speaks in depth of duplicitous indictments:

“Duplicitous indictments obscure the specific charges and may violate a defendant's constitutional rights to notice of the charges against him or hinder a defendant's ability to plead double jeopardy in a subsequent prosecution. Duplicitous indictments may also prevent the jury from separately deciding guilt or innocence with respect to each particular offense, thus creating uncertainty as to whether the defendant's conviction was based on unanimous jury decisions. Further, duplicitous indictments raise the risk of prejudicial evidentiary rulings. Generally, duplicity is not fatal to an indictment by electing the basis upon which it will continue. A corrective instruction to the jury may also cure the violation.”

(see Pgs. 245-257 of the Georgetown Law Journal)

The record will reflect that the State motioned to amend count four(4) of the indictment by electing to proceed under the subsection of (a)(2), thus deleting the (a)(1) subsection so as not to confuse the jury. The State's motion to amend count (4) reflects as follows:

Ms. Howe-Gerbes:

~~“I forgot to take off part of that...but it goes to count number~~

four(4) your Honor. The State had indicted listing subsection (A)(1) and (2) under the robbery . We are just asking to delete subsection (1) and go under subsection (2)...”(see Tr. Tp.Pg.126 Lines 20-25).

The State further states as follows:

Ms. Howe-Gerbes:

“That is why I'm asking the Court to consider that amendment to make it less confusing for the jury.”
(Tr. Tp. Pg.127 Ln.12-16)

Here, there is no question that good cause is shown by the state as grounds for amending count four (4) of the indictment. In fact, it would appear that the trial court supports the State's reasoning for motioning to amend count four(4); which the record will clearly reflect.

The Court:

“If the Court would not grant that amendment it is charged in the alternative so the jury ...all it does is kind of clean up the language and remove what might be otherwise confusing to the jury?”
(Tr. Tp. Pg.127 Ln. 12-16)

The amendment that the State requested would require no more than a correction of an obvious clerical error by deleting unnecessary and prejudicial matter; which would not affect the indictment's validity. The amendment would cause no delay in the proceedings; the defendant would suffer absolutely no violation of his constitutional due process rights as a result of the amendment; and the trial court would be well within its discretion in granting a motion that would ultimately provide protection of defendant's due process rights. But rather than grant the defendant's motion to amend count four (4) of the indictment, the trial court consequently announced the following decision in regards to the states motion:

The Court:

“I guess the Court has confidence in the jury's ability to be able to sort it out and for us to properly define in our instructions to the jury the alternative to them in the elements.”
(Tr. Tp. Pg. 128 Ln. 6-9)

It is not necessary for a trial court to give a specific instruction to the jury unless 1) a count is extremely complex; 2) there is a variance between the indictment and the proof at trial; or and 3) there is a tangible risk of jury confusing. U. S. v. Dolan 99 F.2d 1140; Sanderson 996 F.2d 187; U.S. v. Dun-

can 850 f.2d 1140; and Downing v. U.S. 493 U.S. 1025.

Due to the complexity of count four's (4) multiple charges, which were obvious on the face of the record, both the State and the trial Court agreed that the potential risk of jury confusion existed, thus requiring an instruction which would cure the violation caused by the duplicitous indictment. Failure to charge the necessary instruction created a record which reflects first (1) , the trial Court's error of failing to grant a necessary reasonable and timely motion to amend a duplicitous count of the the indictment; second (2), the Court's failure to charge a corrective instruction that even the trial Court itself expressed a need to charge; and third(3), the error of presenting the jury with a verdict form which misled the jury for failure to specify a degree of the offense charged.

Combined , these errors amount to the trial Court's abuse of discretion and prejudiced Appellant by depriving him of a fair trial and a right to due process. Also, the 2911.02 (a)(2) conviction exposes him to future societal stigma, probatable obstacles and recidivist sentence enhancements.

On the very first day of trial, Appellant assumed the role of lead counsel and ultimately represented himself at trial. But prior to the first day of trial, the duplicitous indictment issue is an issue that could have and should have been recognized, raised, and argued by trial counsel. The record will reflect that both, trial counsel and Appellate counsel's performances were deficient for failure to raise such an obvious and prejudicial error.

PROPOSITION OF LAW NO. III: Trial Court abused its discretion and committed plain error when it failed to charge the jury with an instruction which would cure the error that count four's (4) duplicitous language and multiple offenses caused.

The Sixth Amendment to the United States Constitution requires unanimity and a jury must be properly instructed in order to achieve it. U.S. v. Petersen 768 F.2d. 64. When it appears...that a conviction may occur as a result of different juror's concluding that the Defendant committed different acts, the general unanimity instruction does not suffice. To correct any potential confusion m, the trial Court must augment the general instruction to ensure the jury understands it's duty to agree on a particular set of facts. State v Johnson 545 N.E. 2d. 636 citing Gibson 553 F.2d. 453.

It's clear from the record that the trial Court recognized a need to charge the jury with an instruction which would assure that the jury understood it's duty to agree on a particular set of facts. Judge Mayberry first verbalized his understanding of the potential jury confusion by stating the following:

The Court:

“If the Court would not grant that amendment it's charged in the alternative so the jury, it would... all it would do is clean up the language and remove what would be otherwise confusing to the jury.” (see Tr. Tp; Pg. 127 Ln. 12-16)

The trial Court further expressed it's understanding of the need to properly charge the jury with a corrective instruction when it went on to state:

The Court:

“I guess the Court has confidence in the jury's ability to be able to sort it out and for us to properly define in our instructions to the jury the alternative to them in the elements.” (see Tr. Tp. Pg. 128 Ln. 6-9)

This Court may review the record to determine the sufficiency of the eventual instruction given to the jury, but it's apparent from the question that the jury submitted to the trial Court during deliberations and ultimately, their general verdict of guilty in count four (4) as charged in the indictment, the instruction failed to ensure that the jury understood it's duty of reaching an agreement on a particular set of facts. During deliberations, the jury sent a letter to the trial Court asking the following questions:

The Court:

“We have a question from the jury which states”, ' Does quote, attempted to inflict or threatened to inflict physical harm on another' end quote.' ', without a weapon or ordnance fulfill part 5 in count 4? (see Tr. Tp. Pg. 197 Ln. 5-9)

Also, see verdict form to determine whether or not count four (4) as charged in the indictment, sufficiently sets forth a particular set of facts for the jury to decide upon without either the indictment being amended, the instructions to the jury being augmented, or the verdict form being altered to specify a particular degree of the offense charged. (robbery). The need for and augmented instruction stemmed from an obvious defect in count four (4) of the indictment which the record will reflect first (1), was the focus of a “motion to amend”, filed by the State at trial; and second (2), was the core cause for the jury's confusion and question during jury deliberations. Because the record preserved this issue for the purpose of appeal and it was an obvious and plain error not to charge the jury with a corrective instruction, the failure to recognize, raise, or argue this error on direct appeal must constitute a deficiency in Appellate counsel's performance, thus clearly indicating ineffective assistance of appellate counsel as found in State v. Brady (1984) 42 OH. St. 3d. 136. Failure to instruct the jury on such a complex issue alone constitutes plain error under Crm. R.52(B). Also see In Re Etter (1998) 731 N.E.

2d. 694, Goldfuss v. Davidson 679 N.E. 2d. 1099 and In Re Alyssa C. 790 N.E. 2d. 803.

But failure to properly instruct the jury even after the trial Court denied the State's reasonable, necessary, and timely motion to amend the count of the indictment that was defective and posed the potential threat of jury confusion to begin with, well after the jury expressed its confusing during deliberations with respect to the duplicity of count four (4), constitutes a plain error which was the direct result of the trial Court's blatant abuse of discretion. **State v. Wolon (1989) 541 N.E. 2d. 443; Geesman V St. Rita's Med Ctr. 917 N.E. 2d. 867; State v. Carter 2010 WL 5441988 citing State v. Comen (1990) 50 OH. St. 3d. 206**

PROPOSITION OF LAW NO. IV: The evidence offered at trial was insufficient and against the manifest weight to support a conviction for count's 1,2,3, and count four's (4) robbery charge in violation of R.C. 2911.02 (a)(1) (w/ a deadly weapon).

Whether the evidence is legally sufficient to sustain a verdict is a question of law. **State v. Robinson (1955) 124 N.E. 2d. 148.** A conviction based on legally insufficient evidence constitute a denial of due process. **Tibbs v. Florida (1982) 457 U.S. 31** citing .

The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. **State v DeHaas 227 N.E. 2d. 212.** On review, the Appellate Court must determine after reviewing the evidence in a light most favorable to the prosecution whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. **State v. Jinks 574 N.E. 2d. 492.**

Article IV section 3(b) (3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court has authority and a duty to weigh the evidence to determine whether the findings of ... the trier of fact were so against the weight of the evidence as to require a reversal and remanding of the case for retrial. **State ex rel. Squire v Cleveland (1948) 82 N.E. 2d. 709.**

A reviewing court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence the trier of fact clearly lost it's way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. **State v. Martin (1983) 485 N.E. 2d. 717.**

Appellant was indicted and stood trial for committing theft offenses of robbery in violation of Ohio's Revised Codes 2911.02(a)(2); 2911.02(a)(1); and 2911.01(a)(1). Both R.C. 2911.01(a)(1) and 2911.02(a)(1) require the employment of a deadly weapon in order to constitute a conviction for either of the two offenses. Further, in order to constitute a conviction for robbery in violation of 2911.01(a)(1), as indicted here in the instant case, Appellant was required to have employed the use of a 'handgun' in the commission of said robbery offense. (see indictment and Bill of Particulars)

During trial, the State called a variety of witnesses who testified to the events of the day and robbery in question. However, only one of the States many witnesses testified to observing a weapon during the robbery. The State's key witness, Jenny Martin, testified to positively witnessing a gun in the hand of Appellant's co-defendant during the offense. (Tr.Tp.Pg. Ln. 20). During trial, there was absolutely no other evidence offered to support the theory of there being another form of deadly weapon employed during the commission of the crime and the State failed to argue or introduce evidence of the same.

Following trial, Appellant was found 'not guilty' of count five's (5) aggravated robbery charge in the indictment; which specified the use of the handgun that key witness, Jenny Martin, testified she witnessed one of the men holding, (R.C. 2911.01(a)(1)-to-wit-handgun). Consequently, Appellant was found guilty of count four's (4) robbery charge in violation of R.C. 2911.02(a)(1) in the indictment; which also required the employment of a 'deadly weapon' in order to constitute a conviction for this offense. Here, Appellant challenges the sufficiency of the evidence offered in order to sustain the conviction which required the employment of a 'deadly weapon'.

If the only evidence offered at trial, regarding a 'deadly weapon' consisted of the handgun that the key witness, Jenny Martin testified she saw during the robbery and ultimately, the jury found Appellant 'not guilty' of the only count which charges Appellant with employing a handgun, two things become apparently clear: first(1), the jury clearly did not find the State's key witness, Jenny Martin to be credible; and secondly(2), the jury determined that the offense was not committed by use of a 'deadly weapon'.

Without evidence to support otherwise, the State could only advance on either one of two theories: either Appellant committed the robbery offense by threat, attempt or infliction of physical harm as found in R.C. 2911.02(a)(2) of the robbery statute or the robbery offense was committed by employment of a handgun as found in R.C. 2911.01(a)(1) of the robbery statute. There exists no evidence offered that supports the use of a bat, knife, stick, chain, or any object that could be considered a 'deadly weapon'; only a gun.

It's apparent, as the record will reflect, that the State realized it could only advance on one of the aforementioned theories, which explains the State's motion to amend count four(4) by completely deleting the (a)(1) portion during trial. (see Tr. Tp. Pg. 126 Ln. 24-25) In reaching a determination in this matter, Appellant urges this Honorable Court to widen its scope of review to determine whether or not the verdict of guilt for R.C. 2911.02(a)(1) was reached by the jury or by the trial Court itself. From the start, count four(4) was duplicitous; (see indictment and Bill of Particulars) the trial Court refused to grant a motion to correct the violation; (see Tr. Tp. Pg. 128 Ln. 6-9) the jury's question regarding the (a)(1) and (a)(2) elements made their intent clear; (see Tr. Tp. Pg. 197) the trial Court's instructions before and after the jury sent the Court the letter during deliberations was erroneous; (review the record) and after hearing all of the evidence, the trial Court further abused its discretion by convicting Appellant of a charge which the evidence failed to support despite the obvious fact that said evidence was insufficient and the jury was in support of a conviction for the violation of R.C. 2911.02(a)(2).

For the reason(s) aforementioned, Appellant adamantly insists that he was deprived a fair trial and Due Process due to the trial Court's unreasonable, arbitrary, and unconscionable attitude towards him. Furthermore, this is an issue which also could and should have been recognized, raised, and argued on direct appeal if not for Appellant's counsel deficient performance, the issue went unaddressed.

CONCLUSION

At this time Appellant maintains that not only are the fact and particulars highlighted within this memorandum true and exact, but are supported by a bevy of case law preceding them. Crm.R.32(c) clearly calls for the journalizing of each and every charged prosecuted, particularly where a single count has been found to be duplicitous in its nature.

The error found in this complaint of law, was borne of the trial Court and its unabashed refusal to adhere to the letter of the law; that being to instruct the jury to the proper justified offenses stated within the indictment. This duty was further ignored when said jury requested such instruction but was left to 'figure it out' for themselves. This abuse of discretion by the trial Court, whether intentional or not, indisputably prejudiced this defendant and directly contributed to his faulty conviction in regards to count four(4) of the indictment.

Furthermore and more telling of the breadth of this abuse by the Court, is the denial of the State's Motion to amend. The State not only recognized that an error had occurred but charged with the duty of not allowing a defective duplicitous count to stand, did everything possible to correct it, but unfortunately, as with the jury, was also ignored by the trial Court.

Moreover, the record clearly supports Appellant's argument of insufficient evidence and manifest weight of evidence where there was absolutely no direct or circumstantial evidence offered to support the theory of the crime being committed by employment of another form of 'deadly weapon' outside of the handgun which witness/victim, Jenny Martin testified was used to commit the robbery. Therefore, a conviction of a robbery which requires the use of a 'deadly weapon' that is not a 'handgun' cannot stand for lack of evidence to support and constitute the 'deadly weapon' element.

Finally, the verdict form clearly fails to satisfy the Crm.R.32(a) requirement of stating a specific degree of the offense charged. While this issue is one that clearly has merit and could stand alone, it is further bolstered by counsel's ineffective performance as well as the cumulative errors and arguments found herein this Memorandum.

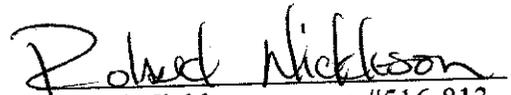
May the Court find this well taken.

Roland Nickleson

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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Roland Nickleson's Notice Of Appeal was sent to Counsel for the State of Ohio, Gwen Howe-Gerbers at One Courthouse Square, Bowling Green, OH. 43402 by regular U.S. Mail on this 9 day of Nov. 2011 via Supreme Court of Ohio office of the Clerk, 65 South Front Street, Columbus, OH. 43215-3431.


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IN THE SUPREME COURT OF OHIO

Roland Nickleson, Pro se
-Appellant-

v.

State of Ohio,
-Appellee-

* On Appeal from the Wood
* County Court of Appeals
* Sixth Appellate District
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* Court of Appeals
* Case No. WD-11-039
*
*

11-1780

Notice of Appeal of Appellant Roland Nickleson

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OCT 17 2011
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Notice of Appeal of Roland Nickleson

Appellant Roland Nickleson hereby gives notice of appeal to Supreme Court of Ohio from the judgment of the Wood County Court of Appeal, Sixth Appellate District, entered in Court of Appeals Case No. WD-11-039 on 9-31-11.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,
Roland Nickleson, Pro se



Roland Nickleson, Pro se

Certificate of Service

I certify that a copy of this Notice of Appeal has been sent to counsel for State of Ohio, Gwen Howe-Gerbers, One Courthouse Square, Bowling Green Ohio, Wood County Common Pleas Court prosecutor at One Courthouse Square, Bowling Green Ohio 43402 on this 10 day of October 2011.



Roland Nickleson, Pro se

FILED
WOOD COUNTY, OHIO
AUG 31 10:07

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State ex rel. Roland Nickelson

Court of Appeals No. WD-11-039

Relator

v.

Alan Mayberry

DECISION AND JUDGMENT

Respondent

Decided:

AUG 31 2011

Roland Nickelson, pro se.

HANDWORK, J.

{¶ 1} On June 24, 2011, relator, Roland Nickelson, commenced this mandamus action against respondent, Judge Alan Mayberry, to compel the judge to reverse his decision denying Nickelson's May 17, 2011 petition for postconviction relief.

{¶ 2} The relevant history of this action is as follows. In February 2006, a jury found Nickelson guilty on three counts of kidnapping, one count of robbery, one count of

**JOURNALIZED
COURT OF APPEALS**

AUG 31 2011

1.

Vol. 35 Pg. 308

FAXED

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT FILED AT WOOD CO. COMMON PLEAS COURT, BOWLING GREEN, OHIO
BY Cindy A. Horner DEPUTY CLERK
THIS 31st DAY OF Aug. 2011

theft of drugs, and one count of aggravated robbery. For these offenses, relator received an aggregate sentence of 28 years and 11 months in prison.

{¶ 3} In September 2008, relator filed a postconviction petition requesting the trial court to vacate or set aside relator's conviction or sentence. On December 12, 2008, the trial court denied the petition on the grounds that it was untimely filed.

{¶ 4} In December 2010, relator filed a second postconviction petition, this time requesting resentencing. On January 13, 2011, the trial court, finding that relator had been properly sentenced, denied this motion.

{¶ 5} In his May 17, 2011 petition, relator again requested a resentencing hearing. As grounds for this petition, relator alleged deficiencies in Count 4 of the indictment against him, for robbery. The judge, in his May 26, 2011 order, addressed these alleged deficiencies and, upon finding no error—and further finding that the matter had been previously reviewed by this court—denied relator's motion.

{¶ 6} The principles that govern mandamus are well established and are as follows: (1) the relator must have a clear legal right to the requested relief, (2) the respondent must have a clear legal duty to perform the requested relief, and (3) there must be no adequate remedy at law. *State ex rel. Freed v. McMonagle*, 8th Dist. No. 82678, 2003-Ohio-3382, ¶ 7. "[A]lthough mandamus may be used to compel a court to exercise judgment or to discharge a function, it may not control judicial discretion, even if that discretion is grossly abused." *Id.* In addition, mandamus is not a substitute for appeal. *Id.* Thus, mandamus is not a vehicle by which to correct errors or procedural

irregularities in the course of a case. *State ex rel. Nelson v. Russo*, 8th Dist. No. 96706, 2011-Ohio-3698, ¶ 6. Relief in mandamus is also precluded where a relator had an adequate remedy, regardless of whether it was used. *Id.*

{¶ 7} In the instant case, relator had an adequate remedy at law, through direct appeal, to contest the respondent judge's denial of his motion. As stated by the court in *Freed*, supra, "[A]ppeal, not mandamus, is the proper remedy for correcting irregularities or errors in postconviction proceedings." *Id.* at ¶ 9. Thus, mandamus is precluded in the instant case.

{¶ 8} In addition, relator had multiple opportunities in the past to raise the argument concerning the language of the indictment. When relator did raise the argument, both the trial court and this court specifically rejected it. That this court has specifically rejected relator's argument also means that it is barred by *res judicata*. See *State ex rel. Nelson v. Russo*, supra, at ¶ 7.

{¶ 9} For all of the foregoing reasons, this court denies relator's application for a writ of mandamus. Costs are assessed against relator. The clerk is directed to serve upon all parties, within three days, a copy of this decision in a manner prescribed by Civ.R. 5(B).

WRIT DENIED.

**JOURNALIZED
COURT OF APPEALS**

AUG 31 2011

State ex rel. Nickelson
v. Mayberry
C.A. No. WD-11-039

Peter M. Handwork, J.

Peter M Handwork

JUDGE

Arlene Singer, J.

Arlene Singer

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

Stephen A Yarbrough

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

**JOURNALIZED
COURT OF APPEALS**

AUG 31 2011

Vol. 35 Pg. 311

FILED
WOOD COUNTY CLERK
COMMON PLEAS COURT

2011 MAY 26 P 3:04

CINDY A. HOFNER

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,

2005CR0361

Plaintiff,

Judge Mayberry

Vs.

Roland Nickelson,

ORDER

Defendant.

May 26, 2011

This matter comes before the court on the defendant's request for a sentencing hearing, filed May 17, 2011 and the memorandum in support thereof. The defendant argues that the court has not issued a final appealable order in this matter with regard to Count 4.

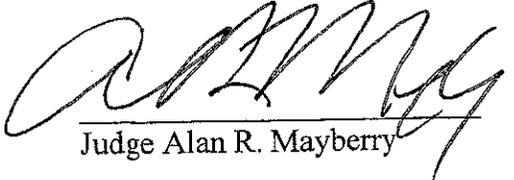
The defendant, who was indicted under the spelling Nickelson, but who signs his name as Nickleson, argues that Count 4 of the indictment contained two separate robbery offenses: one offense being a violation of division (A)(1) of section 2911.02 of the Ohio Revised Code and the other offense being a violation of division of (A)(2) of the same section. The defendant argues that because Count 4 contained language that encompassed both division (A)(1) and division (A)(2) of the robbery statute and because he was sentenced for a violation of division (A)(1) but not for a violation of division (A)(2), there remains an unsettled issue as to Count 4 and that until it is resolved this court's judgment regarding Count 4 is not final and appealable.

The defendant argues that because he was found not guilty of the aggravated robbery charge in Count 5, which alleged that he had a deadly weapon on or about his person or under his control and that he displayed or brandished or indicated that he possessed a deadly weapon or that he used a

deadly weapon during the commission of the offense constituting Count 5, the conviction on Count 4, which required either that the defendant had a deadly weapon on or about his person or under his control or that he inflicted or attempted to inflict or threatened to inflict physical harm on another, represents a verdict that is inconsistent with the evidence. The defendant argues that because the Verdict Form for Count 4, which he calls misleading, did not specify whether he was found guilty of a violation of division (A)(1) or a violation of division (A)(2) of the robbery statute, that a hearing must be conducted in order to resolve this issue. The defendant further argues that the jury instructions were improper and that as a result the sentence imposed for Count 4 is improper as a matter of law. The defendant further alleges that the sentencing entry does not comply with Crim.R. 32(C). The defendant suggests that until this court issues a final appealable order, the court of appeals may not review this matter. This court, however, notes that the court of appeals reviewed this matter in 2006WD0023 and declined the opportunity to review it again in 2009WD0002. This court determines that the alternative language employed in Count 4 did not cause the verdict rendered thereon to be incomplete. The court finds that it has issued a final appealable order as to Count 4.

Accordingly, the defendant's request to be returned to the trial court for further proceedings is not well-taken and his motion for a sentencing hearing is denied.

So Ordered.


Judge Alan R. Mayberry